IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLAN and DIANNE NOWICKI	:	CIVIL ACTION
	:	
v.	:	
	:	
ALLEN GREEN	:	NO. 98-5100

MEMORANDUM AND ORDER

Yohn, J. May , 1999

Plaintiffs and defendant entered into multiple financial transactions over a period of several years involving money which Allan Nowicki borrowed from defendant. Nowicki attempted to sell real property, which was the collateral for one of the loans, and contends that the defendant offered to finance the deal, but the sale fell through when defendant reneged or changed the terms of the financing. Subsequently, plaintiff Allan Nowicki filed for bankruptcy. After he was discharged from his debts, defendant confessed judgment against him in state court, later withdrawing the action. Defendant also instituted mortgage foreclosure proceedings in state court against the home of both plaintiffs.

Plaintiffs then filed the instant suit, claiming that defendant violated the Equal Credit Opportunity Act; breached a contract when the deal to sell real property fell through; converted plaintiffs' funds by attaching a bank account pursuant to the confession of judgment; slandered plaintiffs' credit; abused process and wrongfully used civil proceedings when defendant instituted the confession of judgment; intentionally

interfered with plaintiffs' prospective contractual relations. The suit requested the court to issue declaratory judgments affirming the bankruptcy discharge, and voiding the mortgage.

Defendant has filed a motion to dismiss which will be denied in part and granted in part.

I. FACTUAL BACKGROUND

Plaintiffs, Allan and Dianne Nowicki, engaged in multiple financial transactions with defendant, Allen Green. By 1993, Allan Nowicki had borrowed $680,000 ("Old Loan Notes") from Green. See Amended Complaint, ¶ 10. The Old Loan Notes were secured by mortgages on property which Nowicki owned individually on Route 611 ("Route 611 property") in Bucks County, Pennsylvania. See id. Also by 1993, Allan and Diane Nowicki had a bank loan, from First Union Bank, secured by property in Wayne County which they owned jointly ("Wayne property"). See id. at ¶¶ 12-14 and 34[1].

In 1993, Allan Nowicki entered into a transaction to sell the Route 611 property to Werner Koller. See id. at ¶ 15. Green allegedly agreed to finance the sale but eventually

[1] The ownership of the Wayne property is unclear. The amended complaint describes the property as being jointly owned by Allan and Diane Nowicki. See Amended Complaint ¶¶ 13 and 34. This allegation is of course binding on the court for purposes of the motion to dismiss. However, the court notes that the mortgage executed March 28, 1994 describes the property as owned by Allan alone, trading as Stockton Associates and the Forbearance Agreement stats that: "The Wayne County properties shall be in the name of Allan J. Nowicki, trading as Stockton Associates." See Mortgage, Exh. H. to Defendant's Motion to Dismiss; Forbearance Agreement, ¶ 5(a), Exh. G to Defendant's Motion to Dismiss.

reneged or changed the terms of his agreement to finance, so that Koller refused to purchase the property. See id. at ¶¶ 16-20.

In March 1994, Allan Nowicki borrowed an additional $260,000 ("New Loan Note") from Green. See id. at ¶¶ 23-28. This loan was secured by a second mortgage on the Wayne property, Dianne Nowicki's surety and a mortgage on Dianne Nowicki's (and Allan Nowicki's) home. See id. At the time of the New Loan Note, the Nowickis allegedly also entered into an agreement with Green whereby Green had to release Dianne Nowicki's surety and the mortgage on Dianne Nowicki's (and Allan Nowicki's) home if the Nowickis provided an appraisal of the Wayne property of not less than $1.7 million dollars net of liens and encumbrances and lender's title insurance on the Wayne property. See id. at ¶ 29. The Nowickis gave Green the appraisal, but not the title insurance. See id. at ¶¶ 30-32.

In June 1994, Allan Nowicki individually filed for bankruptcy in the Eastern District of Pennsylvania. See id. at ¶ 40. Nowicki filed for bankruptcy to prevent First Union from foreclosing on the Wayne property. See id. In November 1997, Nowicki received a Discharge Order ("Discharge Order"), which was served on Green's counsel. See id. at ¶¶ 43-44.

In 1997, Green filed a mortgage foreclosure action in the Court of Common Pleas of Bucks County against Dianne Nowicki's (and Allan Nowicki's) home. See id. at ¶ 57. In August 1998, Green confessed judgment against Allan Nowicki on the New Loan

Note, and attached funds in a bank account jointly owned by the Nowickis. See id. at ¶¶ 45-46. The confessed judgment was struck by Green a month later, when the original complaint in this case was filed. See id. at ¶ 51. The attached bank account was charged for the costs associated with the bank's response to the attachment and checks which the Nowickis had written against the account were returned for insufficient funds as a result of the attachment. See id. at ¶¶ 52-56.

II. MOTION TO DISMISS

A. Standard

Defendant has filed a motion to dismiss for failure to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6). The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. See Wisniewski v. Johns Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985); P.F. v. Mendres, 21 F. Supp. 2d 476, 479 (D.N.J. 1998). In deciding a motion to dismiss, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the [non-moving party]." Jordon v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994) (citing Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989)). Therefore, the facts presented herein are based on plaintiff's Amended Complaint. At the motion to dismiss stage of litigation, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King &

Spalding, 467 U.S. 69, 73 (1984).

B. **Count I**

The Nowickis' Amended Complaint alleges that in March of 1994, Green conditioned a loan to Allan Nowicki on Dianne Nowicki signing a surety and a mortgage for her (and their) personal residence. See Amended Complaint, ¶¶ 23-25. Dianne Nowicki claims that requiring her surety and mortgage for this loan violated the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, because Allan qualified for the loan on his own. See Amended Complaint, ¶¶ 59-61. Diane Nowicki seeks a declaratory judgment that the surety and mortgage are void; an injunction preventing Green from foreclosing on her home; and costs and attorneys' fees. See Amended Complaint, ¶ 62.

Specifically, Dianne Nowicki claims that requiring the surety and mortgage violated Regulation B, 12 C.F.R. § 202.7(d)(1), which was promulgated under the ECOA. The relevant provision of Regulation B provides that: "[A] Creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1). The ECOA provides a two year statute of limitations for such claims. See 15 U.S.C. § 1691e(f). The surety and mortgage were executed in March 1994 and the Complaint was filed on September 25, 1998. According to the Amended Complaint, the violation occurred when Green required Dianne Nowicki's surety and mortgage in March

1994. See Amended Complaint, ¶¶ 25, 61. Therefore, the statute of limitations bars any affirmative claim by Dianne Nowicki under the ECOA. The statute of limitations may be asserted in a motion to dismiss, as long as the limitations bar is "'apparent on the face of the complaint . . . .'" Rycoline Products, Inc. v. C & W Unlimited, 109 F.3d 883, 886 (3d Cir. 1997) (quoting Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978)).

Nowicki claims that the statute of limitations does not affect her claim because she is bringing her claim defensively in response to Green's foreclosure action and the Third Circuit has specifically allowed such ECOA claims to be brought defensively. The Third Circuit has allowed such an action to be brought in federal court in response to a confession of judgment which was brought in state court. See Silverman v. Eastrich Multiple Investor Fund, 51 F.3d 28, 32 (3d Cir. 1995). In Silverman, the court explained that although the plaintiff could not assert the ECOA violation affirmatively once the statute of limitations had run, she "retained the right to assert the violation when efforts were made to collect and enforce the Guaranty." Id. Further, the court emphasized that "[a]lthough plaintiff brought this suit in federal court, her ECOA claim was raised in direct response to Eastrich's state court confession of judgment, which did not require or provide for an answering pleading." Id. In a subsequent case, the Third Circuit explained that "Silverman holds only that where judgment has been confessed, a purported obligor may assert as a defense to its enforcement a statutory violation which

would have been time-barred if asserted offensively in an independent action." Algrant v. Evergreen Valley Nurseries Ltd. Partnership, 126 F.3d 178, 182-83 (3d Cir. 1997). The parties have not suggested and the court sees no principled distinction in this regard between a confession of judgment proceeding and a mortgage foreclosure proceeding under Pennsylvania law. Therefore, the motion to dismiss Count I will be denied[2].

C. **Count II**

Plaintiffs ask, in Count II of the Amended Complaint, that the court issue a declaratory judgment that the mortgage on their home is discharged because plaintiffs substantially performed the conditions for release. Alternatively, plaintiffs claim that defendant prevented their performance.

Under Pennsylvania law, the doctrine of substantial performance protects a party to a contract from "forfeiture of [their] labor and materials for what at most can only be regarded as a trivial or inappreciable variation in the contract. The law is not so harsh as to put such a penalty upon an innocent person for a minor defect which did not damage the other party or cause him to lose a single cent." Sgarlat v. Griffith, 36 A.2d 330, 332 (Pa. 1944) (emphasis added). Thus, in Sgarlat, although the contract specified an extra payment for removal of rock by blasting, where such removal was necessary, the

[2] I note, however, that it seems highly likely based on the documents attached to defendant's response that at the summary judgment stage Allan Nowicki will be determined not to have been independently creditworthy so that the provisions of the ECOA were not breached.

contractor was entitled to be paid the contractual blasting amount where he used a more costly method because it was more appropriate. See id. at 331-32. Although the contractor had not performed exactly as specified in the contract, the outcome was the same and therefore, the contractor was entitled to payment. See id. Thus, the doctrine of substantial performance applies where the deviation from the contract is slight or immaterial and does not damage the other party. See id.; Cimina v. Bronich, 537 A.2d 1355, 1358 (Pa. 1988). The Nowickis' actions, as described in their complaint, arguably fall within this description. According to the Amended Complaint, Dianne Nowicki executed a surety agreement and a mortgage on her home in March 1994, both of which Green was supposed to release if the Nowickis provided an appropriate appraisal of the property in Wayne and lender's title insurance for the same property. See Amended Complaint, ¶¶ 23-29. The Nowickis allege that they provided an acceptable appraisal but that they did not provide title insurance, claiming that there is no dispute regarding the title to the property in question. See id. at ¶¶ 30-34. Accepting all of plaintiffs' allegations in the complaint as true, they may have substantially performed under the contract. See Fort Washington Resources, Inc. v. Tannen, 901 F. Supp. 932, 940 (E.D. Pa. 1995) (discussing an immaterial flaw in performance as a "'mere technical, inadvertent, or unimportant omission[] or defect[].'") (quoting Mort Co. v. Paul, 76 A.2d 445, 447 (Pa. Super. Ct. 1950)). Their allegations are sufficient to overcome a motion to dismiss although the court, on summary judgment or at trial, may decide otherwise.

Likewise, plaintiffs' allegation that defendant prevented them from performing needs a factual context established through discovery. Therefore, the motion to dismiss Count II of the Amended Complaint will be denied.

D. **Count III**

Plaintiff Allan Nowicki, in Count III, is requesting that the court issue a declaratory judgment stating that "all obligations owed by Allan [Nowicki] to Green as of the date of the Discharge Order, including the Old Loan Notes and New Loan Note, have been discharged . . . ." Amended Complaint, ¶ 67(a). In effect, plaintiff is asking this court to reaffirm the discharge order. According to the Supreme Court, when considering whether a controversy exists under the Declaratory Judgment Act, "[b]asically the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); see Travelers Insurance Co. v. Obusek, 72 F.3d 1148, 1154 (3d Cir. 1995) (relying on Maryland Cas. to define controversy in context of Declaratory Judgment Act). Such a controversy does not exist here. Although plaintiff claims that defendant's withdrawn confession of judgment has generated a controversy regarding the effect of the Discharge Order, this is not true. The Discharge Order is in effect, and there is no controversy regarding it for this court to adjudicate. Defendant concedes in his motion to dismiss that the Old and New Loan

Notes executed by Allan Nowicki were discharged by the bankruptcy action and Allan Nowicki concedes in his response that the liens on real property were not discharged by the bankruptcy. Thus, there is no controversy and Count III of the Amended Complaint will be dismissed.

E. **Count IV**

Count IV of the plaintiffs' Amended Complaint alleges a breach of contract by Green when he failed to follow through on his commitment to finance the sale of the Wayne property to Koller in 1993. See Amended Complaint, ¶¶ 69-70. As a result of Green's breach, Allan Nowicki alleges allege that: Allan could not repay the old loan notes; Allan had to take out the new loan; Diane executed the surety and home mortgage; and Allan filed for bankruptcy. See id. at ¶¶ 70-72. Plaintiffs therefore claim that they are entitled to set-off the proceeds that Allan Nowicki would have received from the sale to Koller against the amount due on the old and new loan notes, the mortgage on the Wayne property and the home mortgage. See id. at ¶¶ 73-75. They are requesting a declaratory judgment stating that they are entitled to set-off the hypothetical sale proceeds against their obligations to Green; a declaratory judgment stating that they are entitled to set-off the harm Allan Nowicki suffered as a result of filing for bankruptcy against their obligations to Green; and a declaratory judgment stating that their obligations to Green are satisfied and/or void, and finally any other relief which would be just. See id. at ¶ 75a-d.

Under Pennsylvania law, the statute of limitations for a claim of breach of contract is four years. See 42 Pa. Cons. Stat. Ann. § 5525 (West 1998). The Nowickis' Amended Complaint states that Green breached his commitment to finance the sale by March 1994. See Amended Complaint, ¶ 23. Thus, on the face of the Complaint, the statute of limitations for a claim of breach of this contract expired by March 1998. The statute of limitations may be asserted on a motion to dismiss, as long as the limitations bar is "'apparent on the face of the complaint . . . .'" Rycoline Products, Inc. v. C & W Unlimited, 109 F.3d 883, 886 (3d Cir. 1997) (quoting Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978)). The initial Complaint in this matter was filed on September 25, 1998, months after the statute of limitations had expired.

The Third Circuit has held that if the statute of limitations would bar the legal remedy for a claim, declaratory judgment relief is also barred by the statute of limitations. See Algrant v. Evergreen Valley Nurseries Ltd. Partnership, 126 F.3d 178, 184-85 (3d Cir. 1997). Thus, the four year statute of limitations for a breach of contract claim applies to the Nowickis' request for declaratory judgment. Plaintiffs now allege that their claim is saved because it is a recoupment (although the complaint labels it a set off), apparently asserted in response to Green's 1997 mortgage foreclosure action. Under Pennsylvania law, an action in recoupment is allowed to be brought beyond the limitations period purely as a defensive measure. See id. at 184. The defense of recoupment is only available when it concerns the same transaction as that involved in the offensive suit

which prompted it. See id. at 184; Mellon Bank, N.A. v. Pasqualis-Politi, 800 F. Supp. 1297, 1301 (W.D. Pa. 1992), aff'd, Bhatla v. U.S. Capital Corp., 990 F.2d 780 (3d Cir. 1993); Kaiser v. Monitrend Inv. Management, Inc., 672 A.2d 359, 362-63 (Pa. Commw. Ct. 1996).

The Nowickis' claims contained in Count IV are not saved by the doctrine of recoupment because Count IV alleges a breach of contract by Green in a transaction unrelated to the execution of the home mortgage, or any of the other obligations the Nowickis mention in this Count. Therefore, the breach of contract claim is barred by the statute of limitations and Count IV will be dismissed.

F. **Count V**

Under Pennsylvania law, "conversion is the 'deprivation of another's right of property, or use or possession of a chattel, or other interference therewith, without the owner's consent and without legal justification.'" Universal Premium Acceptance Corp. v. York Bank & Trust Co., 69 F.3d 695, 704 (3d Cir. 1995) (quoting Cenna v. United States, 402 F.2d 168, 170 (3d Cir. 1968)); see McDermott v. Party City Corp., 11 F. Supp. 2d 612, 626 n.18 (E.D. Pa. 1998). The Nowickis claim that Green converted their funds when he illegally confessed judgment on the New Loan Note and attached their bank account so that they were deprived of the use of the funds[3]. They allege various damages

[3] How an individual judgment against Allan Nowicki could be used to attach a tenants by the entireties bank account is, at best, unclear to the court.

which occurred as a result of the attachment, including bank charges on the account and returned checks. Thus, although the attachment was later lifted, they have alleged sufficient facts to withstand the defendant's motion to dismiss on the claim of conversion and the motion will be denied in this respect.

G. **Count VI**

It is unclear on the face of the plaintiffs' complaint what tort they are pleading in Count VI. It appears that plaintiffs first claim in this Count is that Green slandered Allan Nowicki when Green refused to finance the sale of the Route 611 property to Koller, thus causing Nowicki to file for bankruptcy[4]. The complaint, however, states that Allan's bankruptcy filing slandered Allan's credit. See Amended Complaint, ¶ 80.

Under Pennsylvania law, "one who publishes a defamatory statement concerning another may be held liable in damages if the statement is false; the publication is unprivileged; and the publication results from fault, at least amounting to negligence, on the part of the publisher." Zerpol Corp. v. DMP Corp., 561 F. Supp. 404, 408 (E.D. Pa. 1983). Further, "[a]n action for defamation, without proof of special damage, will lie where the words used tend to impute to a business insolvency or credit unworthiness." Id. at 409. This tort appears to be what Nowicki is aiming at in Count VI. Green's motion to dismiss, however, appears to read the complaint as alleging disparagement or slander of

[4] Allan Nowicki does not brief this issue and apparently concedes it. However, he does not so state.

title. See Defendant's Motion to Dismiss, p. 30-31. Moreover, Nowicki does not correct Green's reading of the tort alleged. See Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, p. 20-21. The primary difference between the two torts is that to prove disparagement, a plaintiff must show that he suffered direct pecuniary loss as a result of the disparagement. See Zerpol, 561 F. Supp. at 409. Thus, the pleading requirements for disparagement are more stringent. See id.

Defendant, in his Motion to Dismiss, claims that this part of the slander of credit Count is in fact a breach of contract claim masquerading as a defamation action and that plaintiff has not stated a claim for slander of credit. See Defendant's Motion to Dismiss, p. 30. Because that breach of contract claim is barred by the statute of limitations, defendant states that this claim should be dismissed. See id. Plaintiff claims that the bankruptcy filing slandered his credit. See Amended Complaint, ¶ 80. Nowicki himself voluntarily filed for bankruptcy. See id. at ¶ 40. Thus, there was no publication by defendant of a defamatory statement, instead, plaintiffs claim that defendant's breach caused Nowicki to slander his own credit by filing for bankruptcy. Secondly, accepting everything in plaintiffs' complaint as true, including plaintiffs' rather convoluted ideas of causation, the bankruptcy filing occurred in June 1994. See id. at ¶ 40. The statute of limitations for libel and slander actions is one year. See 42 Pa. Cons. Stat. Ann. § 5523(1) (West 1998). Thus, this claim is beyond the limitations period. Although there is some debate as to whether the one year statute of limitations for libel and slander applies

to disparagement claims, rather than the general two year torts statute of limitations, this debate is irrelevant to this issue. See 42 Pa. Cons. Stat. Ann. § 5524(7); Evans v. Philadelphia Newspapers, Inc., 601 A.2d 330, 333-34 (Pa. Super. Ct. 1991). Even if the more generous two year statute applies, any disparagement action based on the facts alleged in the complaint would be barred. The first portion of Count VI will be dismissed.

Also in Count VI, plaintiffs claim that defendant slandered his credit by confessing judgment against Allan Nowicki and attaching the Nowickis' bank account. Defendant claims that because the confession of judgment was stricken, any claims arising from it are moot.[5] However, to plead a defamation claim, all plaintiffs need to plead is that defendant published a false statement concerning plaintiffs, and that the publication was at least negligent. Because the defamatory statement (here, either the confession of judgment or the attachment of funds) dealt with credit unworthiness, special damages need not be pleaded. Plaintiffs allege that defendant confessed judgment and attached the bank account knowing that the debt had been discharged in bankruptcy. See Amended Complaint, ¶¶ 45-47. Further, although the allegation is not needed, the plaintiffs do allege damages flowing from the confession of judgment and attachment. See id. at ¶¶ 55-56. Thus, the motion to dismiss the second part of Count VI will be denied.

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[5] Defendant has not raised the issue in his motion to dismiss that the confession of judgment was a pleading and therefore may be privileged. Therefore, I will not address that issue.

H. **Count VII**

Count VII claims that Green committed the tort of abuse of process by confessing judgment against Allan Nowicki. "[T]he gravamen of abuse of process is use of proceedings for an improper purpose." Sheridan v. Fox, 531 F. Supp. 151, 153 (E.D. Pa. 1982). This tort has three elements: "(1) an 'abuse' or 'perversion' of process already initiated (2) with some unlawful or ulterior purpose, and (3) harm to the plaintiff as a result." Kedra v. Nazareth Hosp., 868 F. Supp. 733, 738 (E.D. Pa. 1994). As explained by the Pennsylvania Superior Court, "[t]he gist of the action is the proper issuance of the original process, but an abuse of that process after it has been issued such that there is a perversion of the process." Triester v. 191 Tenants Ass'n, 415 A.2d 698, 703 (Pa. Super. Ct. 1979). Thus, if a plaintiff used a properly initiated lawsuit to attempt to get a defendant to pay on another claim, that could be abuse of process. See id. at 702-03.

From plaintiff's claim of abuse of process in the complaint, it is unclear whether Green used the confession of judgment in an illegal or improper manner. However, granting all possible inferences to the plaintiff, the confession of judgment may have been used improperly to try to get Allan Nowicki to pay a debt which had been extinguished by bankruptcy. Plaintiff claims that the confession of judgment resulted in funds being frozen, so the defendant's motion to dismiss Count VII will be denied.

I. **Count VIII**

Count VIII appears to allege a claim for wrongful use of civil proceedings (at least

according to plaintiffs' brief), which in Pennsylvania has been codified at 42 Pa. Cons. Stat. Ann. § 8351 (West 1999). The statute states that:

> (a) Elements of action -- A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings [if]:
>
> (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) The proceedings have terminated in favor of the person against whom they are brought.

Id. Allan Nowicki alleges enough in the complaint to prevail in the motion to dismiss with respect to the first element, when he states that Green confessed judgment knowing that he did not have the right to do so. See Amended Complaint, ¶¶ 88-89. The only issue is whether his complaint is sufficient with respect to the requirement of prior termination in his favor. The Pennsylvania Superior Court recently explained that a determination of "'[w]hether a withdrawal of abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought . . . depends on the circumstances under which the proceedings are withdrawn." Bannar v. Miller, 701 A.2d 242, 247 (Pa. Super. Ct. 1997), appeal denied, 723 A.2d 1024 (Pa. 1998) (quoting Rosenfield v. Pennsylvania Auto Ins. Plan, 636 A.2d 1138, 1141 (Pa. Super. Ct. 1994)). Thus, under certain circumstances, a withdrawal of an action will constitute a final termination in favor of the defendant. Establishing those circumstances for the record

will require discovery. Therefore, reading the complaint most favorably to the plaintiff, the confession of judgment may have terminated in favor of him, and the motion to dismiss this Count will be denied.

J. **Count IX**

Count IX claims that defendant intentionally interfered with Allan Nowicki's contracts. Although it is not entirely clear on the face of the amended complaint whether the tort alleged is intentional interference with existing or prospective contracts, plaintiffs state in their response to defendant's motion to dismiss that they are claiming intentional interference with prospective contracts (and they will be so limited at trial). See Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, p. 27 n.16. Therefore, I will only address whether the amended complaint sufficiently states a claim for intentional interference with prospective contractual relations.

Under Pennsylvania law, intentional interference with prospective contractual relations consists of the following four elements: "(1) a prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct." Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173, 184 (3d Cir. 1997) (citing Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979)). The Third Circuit explained that a prospective contractual relation exists where "there [is] an objectively reasonable

probability that a contract will come into existence . . . [which is] something more than a 'mere hope.'" Kachmar, 109 F.3d at 184 (quoting Thompson Coal Co., 412 A.2d at 471). The third element, the absence of privilege or justification, must be evaluated in view of all the circumstances and is highly related to intent. See Kachmar, 109 F.3d at 185. The plaintiff must show that the defendant's action was without privilege or justification. See Silver v. Mendel, 894 F.2d 598, 602 n.6 (3d Cir.), cert. denied, 496 U.S. 926 (1990).

Here, the plaintiffs allege that defendant's agent actively encouraged people to cease doing business with Allan Nowicki. See Amended Complaint, ¶¶ 94-96. These people included potential purchasers of timber and lessees of the Wayne property. See id. at ¶ 97. Plaintiffs further allege that such actions were taken to adversely affect the cash flow of Allan and Diane Nowicki and to force them to transfer money and property to defendant and that as a result, plaintiffs suffered damages. See id. at ¶¶ 98-99.

Although Allan does not elaborate on how close he was to doing future business with the people whom defendant's agent allegedly contacted, he does state that he was doing business with them, and that he believed that these people were going to purchase timber or continue to lease the land. See id. at ¶ 96-97. This is sufficient to defeat the motion to dismiss. Further, plaintiffs do not specifically allege that defendant's actions were without privilege or justification. They do, however, state that defendant intended to hurt their cash flow and that defendant acted in defiance of the Discharge Order. See id. at ¶¶ 98-100. Because the element of absence of privilege or justification is closely

related to intent and depends on all the facts and circumstances of the case, these allegations are sufficient to defeat the motion to dismiss. Therefore, with respect to Count IX, the motion to dismiss will be denied.

III. MOTION TO TRANSFER VENUE

Defendant has requested that if this case is not dismissed, it should be transferred to the District Court for the Southern District of Florida. The primary reasons he gives for transfer are that throughout all of these financial transactions, he has lived in Florida and that he is now sick and unable to travel. He offers no factual support for these conclusions as to his health. Title 28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The decision to grant a transfer pursuant to § 1404(a) lies in the discretion of the trial court. See Shuttle v. ARMCO Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), cert. denied, 401 U.S. 910 (1971); Weinstein v. Friedman, 859 F. Supp. 786, 788 (E.D. Pa. 1994). While the discretion to transfer is broad, the defendant has the burden of establishing its propriety. See Shuttle, 431 F.2d at 25; Tranor v. Brown, 913 F. Supp. 388, 391 (E.D. Pa. 1996). In determining whether to grant a motion to transfer, the court must "'consider all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum.'" Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995) (quoting

15 Wright, Miller & Cooper § 3847).

The Third Circuit has provided factors to aid in determining when to allow a transfer of venue. These factors include both private and public interests. See Jumara, 55 F.3d at 879. The private interests include: (1) plaintiff's choice of forum; (2) defendant's choice of forum; (3) where the claim arose; (4) the parties' convenience as demonstrated by their physical and financial condition; (5) the convenience of witnesses -- to the extent that they may actually be unavailable for trial in one of the fora; and (6) the location of the books and records -- limited to the extent that the files could not be produced in the alternative forum. See id. The public interests include: (1) the enforceability of the judgment; (2) considerations that could make the trial easy, expeditious or inexpensive; (3) the relative court congestion of the two fora; (4) the local interest in deciding local controversies at home; (5) the public policies of the fora; and (6) the familiarity of the trial judge with the applicable state law. See id. at 879-80. All of these factors are not relevant here, so I will consider below only those which are relevant.

When evaluating the first two private factors, the Third Circuit has stated that only where the balance weighs heavily in favor of the defendant's choice of forum should the transfer be granted. See Shuttle, 431 F.2d at 25. The balance of these two factors does not weigh heavily in favor of defendant here. Green wants the matter to be transferred primarily due to his illness and inability to travel. See Defendant's Motion to Dismiss, p. 38. He has, however, filed suit in Pennsylvania before, as demonstrated by the confession

of judgment and mortgage foreclosure. Further, his claim that he has resided in Florida while lending money to Nowicki in Pennsylvania demonstrates defendant's interest in doing business outside of Florida. Plaintiffs state that because Allan Nowicki was previously seriously injured in a plane accident, he does not fly and therefore would have difficulty traveling to Florida. See Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, p. 33. Further, plaintiffs claim that they would have great difficulty arranging for child care for their five children during a trial in Florida. See id. Plaintiffs also claim that many of the relevant negotiations took place in Pennsylvania. Finally, the Supreme Court has stated that "[p]laintiff's choice of forum is entitled to greater deference when the plaintiff has chosen [his] home forum." Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981). Thus, these two factors do not weigh in Green's favor.

Green has stated that he executed some documents in Florida and the Nowickis state that some of the negotiations concerning the transactions took place in Pennsylvania. Thus, where the original loans were made is not clear. The Nowickis' lawsuit, however, was filed primarily in response to Green's Confession of Judgment against Allan and Green's mortgage foreclosure. Both suits were filed in Pennsylvania courts, and the property that forms the collateral for all the loans is located in Pennsylvania. Further, the additional transaction concerned in the lawsuit, the attempted sale to Koller, was an attempted sale of real property located in Pennsylvania. Thus, the claims appear to have a stronger connection to the Eastern District of Pennsylvania than they do to the Southern

District of Florida.

The convenience of the parties as demonstrated by their physical and financial condition was considered as part of the first two factors. This factor does not advance Green's motion to transfer.

The Nowickis indicate that many of their witnesses are located in the Eastern District or at least are subject to process in the Eastern District. They claim that many of their witnesses would not be subject to process in the Southern District of Florida. Green does not claim that any of his witnesses would be unavailable in the Eastern District. The last private factor, the location of books and records, does not appear to apply here.

The only public interest factors which appear to be relevant are the fourth and sixth factors. This matter concerns real property located entirely in Pennsylvania, some of which is in the Eastern District. Further, although neither party directly addresses the choice of law issue, both parties cite Pennsylvania law for all the state law claims. Thus, although neither of these factors is very strong in this case, both do weigh in the plaintiffs' favor.

Because the factors do not favor transfer, and the plaintiff's choice of venue is to be given deference, I will deny the defendant's motion to transfer venue. See Jumara, 55 F.3d at 875, 879.

IV. **CONCLUSION**

The motion to dismiss is granted in part and denied in part. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLAN and DIANNE NOWICKI	:	CIVIL ACTION
	:	
v.	:	
	:	
ALLEN GREEN	:	NO. 98-5100

ORDER

AND NOW, this day of May, upon consideration of the defendant's motion to dismiss, the plaintiffs' response thereto and the defendant's sur-reply;

IT IS HEREBY ORDERED that the motion to dismiss is GRANTED IN PART and DENIED IN PART:

1. The motion to dismiss is GRANTED with respect to Count III, Count IV and with respect to the first part of Count VI; and those Counts are dismissed with prejudice;

2. The motion to dismiss is DENIED with respect to Count I, Count II, Count V, Count VII, Count VIII, Count IX and with respect to the second part of Count VI.

IT IS FURTHER ORDERED that defendant’s motion to transfer venue is

DENIED.

IT IS FURTHER ORDERED that a status conference for this action and Civil Action No. 99-31 for the purpose of simplifying issues and establishing a scheduling order is set for May 14, 1999 at 2:00 p.m. in Courtroom 14-B, U.S. Courthouse, 601 Market Street, Philadelphia, PA.

William H. Yohn, Jr., J.